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QUESTION OF THE VIOLATION OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, INCLUDING PALESTINE

Note verbale dated 7 December 2001 from the Permanent Mission of Israel to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights

The Permanent Mission of Israel to the United Nations Office and other International Organizations in Geneva presents its compliments to the secretariat of the Commission on Human Rights and has the honour to enclose herewith Israel's response to the report of Mr. John Dugard, Special Rapporteur of the Commission on Human Rights dealing with the West Bank and Gaza.*

The Permanent Mission of Israel requests that this document be circulated as an official document of the fifty-eighth session of the Commission on Human Rights under item 8 of the provisional agenda.

* Reproduced in the annex as received, in the language of submission only.

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Annex

Response of Israel to the Report submitted by Professor John Dugard, Special Rapporteur, pursuant to Commission on Human Rights resolutions 1993/2a and 2001/8 and Economic and Social Council decision 2001

General

Israel feels compelled to respond to the Report submitted by Professor John Dugard, Special Rapporteur, pursuant to Commission on Human Rights resolutions 1993/2a and 2001/8 and Economic and Social Council decision 2001.

The Report submitted by the Special Rapporteur is a clearly political document. To his credit, the Special Rapporteur makes no attempt to hide his political agenda, and even states with pride that his aim is "to restore occupation to the center of the stage."

The thesis advanced by the Special Rapporteur is that the occupation of the territories is the root of all aspects of the current conflict, and that while 'immediate causes' may be found for violence and terrorism, the 'ultimate explanation is occupation'.

In advancing this thesis the Special Rapporteur disregards the concerted attempts by Israel to end the current situation, most notably its far reaching peace proposals that were rejected out of hand by the Palestinian side, and repeatedly asserts that the measures taken by Israel to protect civilian lives are more serious violations of international law than the terrorist acts which threaten them.

The result, regrettably, is a document which is likely to give succor to extremists in the Palestinian camp and to further convince them that the path of violence will generate more support from the international community than the path of negotiation.

Mandate of the Special Rapporteur

The Special Rapporteur opens the substantive part of his report by defending his mandate. In doing so, he places himself at odds not only with all those states that have pointed out its obvious failings but also with numerous previous Rapporteurs who have reached the conclusion (several of them resigning) that the mandate is obsolete, one-sided and inapplicable to the current situation.

The Special Rapporteur's comments in this regard need to be addressed in some detail since they attempt not only to justify the mandate, but also to give it an unprecedently expansive interpretation.

In seeking to defend his mandate, the Special Rapporteur has a difficult task, particularly since it violates the UN Charter principle of the sovereign equality of states in so many respects. Most significantly:

- It prejudges the issues that the Special Rapporteur is supposed to investigate, concluding that Israel is guilty of committing violations before considering any evidence.

- It singles out Israel for criticism, while failing to allow the Rapporteur to address violations and provocations by the other party to the conflict.

- It is unique among country specific mandates for being open-ended, and unlike other mandates, fails to allow for any periodic review to reflect changes in circumstances.

- It fails to take any note of the significant changes in the region, most particularly the transfer of territory and responsibilities to the Palestinians as a result of which over 98% of Palestinian now live under Palestinian and not Israeli administration.

The logic of the Special Rapporteur's response to these failings is difficult to follow but appears to comprise three basic assertions.

First assertion: *A distinction must be made between mandates in the context of military occupation and those without regard to military occupation.*

The Special Rapporteur alleges that since the mandate requires an investigation limited to "the context of military occupation" the Rapporteur has no need to relate to changing circumstances or the transfer of responsibilities to the Palestinian side.

This assertion, which is crucial to the Rapporteur's defence (indeed he admits that, were the mandate not restricted to the context of occupation "there would be substance in this criticism" and the mandate "would be unfair"), is hard to sustain. The Special Rapporteur bases his argument on the fact that the Resolution 1993/2A requires him to investigate violations "until the end of the Israeli occupation". In fact, contrary to the Special Rapporteur's assertion, this phrase does not appear in the paragraph of the resolution dealing with the issues to be investigated (4(a)) but rather in 4(c) which sets the time frame in which the Special Rapporteur is to report to the Commission. Further, the phrase makes no reference to the ***context*** of occupation, as asserted by the Special Rapporteur, but merely states the time frame for his reporting obligations. Finally, and most significantly, the Special Rapporteur fails to explain how the phrase 'within the context of military occupation' - even if it did appear in the resolution, and in the appropriate paragraph - would justify ignoring the transfer of powers and territory from Israel to the Palestinians. To the contrary, the question of whether powers have been transferred from an occupying power to the local population is, as described below, one of the key factors in determining whether there is indeed a situation of occupation.

Second Assertion: ***There is a close connection between international humanitarian law and human rights, so violations of the former cannot be examined without reference to the latter.***

This assertion is highly questionable in both law and in logic. In law, it ignores the longstanding distinction between those instances in which humanitarian law is applicable and those in which the governing norms are those of human rights. While there is clearly a relationship between the two, and indeed many fundamental rights are protected by both frameworks, it remains generally accepted they are codified in separate instruments, applicable in different circumstances, and subject to separate international regimes.

In logic this argument is also unconvincing. The fact of a 'close connection', even if it exists, does not imply that the area of humanitarian law cannot be investigated without extending the mandate of the Special Rapporteur to cover human rights law – an expansion which, is should be noted, goes beyond anything envisaged by any of his predecessors.

The arbitrariness of the direction in which the Special Rapporteur seeks to expand the mandate is striking; on the one hand Israel must be scrupulously investigated, not only for any humanitarian violations but also - because these are "closely connected"- for any human rights violations, but on the other the Special Rapporteur sees no "close connection" between Israeli measures and the Palestinian violations to which they are a response.

Finally, it should be noted that the Special Rapporteur's approach not only ensures that Israel remains responsible for behavior conducted in areas and spheres of authority no longer in its control, but also effectively absolves the Palestinian side for its failure to fulfil its own responsibilities in this regard.

Third assertion: *The length of the occupation justifies unique treatment by the Commission.*

The Special Rapporteur states that the "unusual" nature of the mandate, and its expansion to cover the purview of human rights, is justified by the fact that it is a "prolonged military occupation". No support is given for this assertion. In fact, the law of occupation envisages that in cases of prolonged occupation the occupying power will not become more bound, but less bound by the legal regime. The official ICRC Commentary to the IV Geneva convention describes a situation of prolonged occupation which accurately reflects the process of transfer of powers that Israel has engaged in as part of the peace process:

> If the occupation were to continue for a very long time after the general cessation of hostilities, a time would doubtless come when the application of the convention was no longer justified, especially when if most of the governmental and administrative duties carried out at one time by the Occupying Power had been handed over to the authorities of the occupied territory. (ICRC commentary to IVth Geneva Convention, p 62).

In the case of the transfer of powers to the occupied population, continues the Commentary, " the occupying power would only be bound in as far as it continued to exercise governmental functions."

Accordingly, far from providing a basis for expanding his mandate, the prolonged occupation on which the Special Rapporteur bases his argument suggests the opposite. The Special Rapporteur, however, finds himself in a circular paradox of his own making: the law of occupation provides that one can only determine the extent of occupation by considering the transfer of powers and responsibilities to the occupied population; but the Special Rapporteur is unable to do this because, so he asserts, this falls outside his mandate which deals only with the "context of occupation".

The "root cause of the conflict"

Apparently unsatisfied with broadening his one-sided mandate to include the entire realm of human rights law, the Special Rapporteur goes on to offer his personal interpretation of the root cause of the conflict. The assertions he makes in this regard go way beyond the broadest conceivable definition of his mandate, which is, as noted, to investigate violations, not pass judgement on the sources of the conflict.

Further, and far more seriously, these assertions are inaccurate in the extreme.

The Special Rapporteur's account of the history of the conflict begins in 1967, when "Israel occupied the West Bank and the Gaza Strip". This point of departure conveniently ignores decades of Arab hostility to the State of Israel prior to 1967, and, most significantly, the rejection of General Assembly resolution 181("the partition resolution") by Israel's Arab neighbors and their concerted attack on the fledgling state of Israel in what UN Secretary General Trygvie Lee termed "the first instance of armed aggression since the end of the second world war". Nor does he see fit to refer to the context of Israel's coming into control of the territories in the face of another clear attempt to ensure Israel's destruction initiated by its Arab neighbors. Even more striking, in view of his assertion that the occupation is the root of all conflict between Israel and the Palestinians, is his failure to mention the Palestinian calls for the destruction of Israel prior to 1967. These include calls to destroy the state of Israel through armed struggle contained in the Palestinian National Covenant adopted *in 1964*, three years prior to the 1967 war which led, in the Special Rapporteur's view, to the creation of the conflict.

Moreover, the Special Rapporteur who found within his mandate the authority to discuss the roots of the conflict, is strangely silent on attempts to resolve it. No mention at all is made of the repeated attempts made by Israel to reach a negotiated solution, including its far-reaching proposals last year at Camp David and in subsequent negotiations, which would have ended the issues of occupation and settlements. The Palestinian side, it will be recalled, rejected not just these proposals, but the entire process of negotiation and resorted instead to incitement, terrorism and violence. The absence of any reference to these events is all the more striking in view of the Special Rapporteur's declaration that "peace will not be restored to the region until there is clear evidence of an intention on the part of the occupying power to put an end to the occupation.".

The existence of a state of occupation and its legality

Though there are numerous hints and implications to the contrary, the Special Rapporteur is, in the final analysis, forced to admit that there is nothing inherently illegal in a state of military occupation. While occupation cannot in itself acquire sovereign rights, where territory has been taken by a state in an act of self-defense, the continued control of territory until such time as the threat has been removed is perfectly acceptable under international law. As the Special Rapporteur himself notes, "military occupation is a temporary phenomenon pending an acceptable peace settlement".

The Special Rapporteur does however criticize Israel for failing to apply the relevant provisions of international law dealing with occupied territories. In particular, he devotes considerable attention to the question of the applicability of the Fourth Geneva Convention in the territories in question.

The Special Rapporteur refers to the doubts raised by Israel as to whether the IVth Geneva Convention can be considered applicable to the West Bank and Gaza Strip since, on a strict reading of Article 2 of the Convention, this would imply that the former occupants of these areas, Jordan and Egypt, were actually legitimate sovereigns. In this regard the Special Rapporteur argues that Israel fails to take account of the fact that the law of occupation is concerned with the interests of the population of an occupied territory. But what the Special Rapporteur fails to mention is that it is exactly this concern for the interests of the population which led Israel, despite its legal doubts as to the *de jure* applicability of the Convention, to declare that it would apply the humanitarian provisions of the Convention to the territories. Nor does he note that the implementation of these provisions by Israel in practice is, in fact, the only time that they have been applied in the history of the Convention.

As regards Israel's argument that it cannot be considered to occupy areas which it has transferred to the Palestinians and over which it has not effective control, the Special Rapporteur declares this "unacceptable" on the grounds that the test for the application for the legal regime of occupation is not effective control but whether the occupying power "has the ability to exercise such power". This assertion, which would seem to imply that any state is responsible for the behavior of any weaker neighbor, since it could in theory invade and rectify the situation, has no legal basis whatsoever. As authority the Special Rapporteur cites the Nuremberg Military Tribunal Hostages Case, presumably referring to the Court's observation concerning Greece and Yugoslavia, that the fact that "partisans were able to control sections of these countries at various times" did not deprive the German forces of their status as an occupant. One would have thought that the distinction between occasional pockets of partisan control and the negotiated transfer of territories to an elected Palestinian authority, would have been sufficiently clear to the Special Rapporteur. But even were it not, a cursory reading of the judgement would have shown that it restates, with approval, the 1907 Hague Regulations, which are a clear an succinct statement of international law in this regard:

> Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Further support, if required, for the proposition that a state can only be held responsible for behavior within territory under its actual control is provided by the IVth Geneva Convention. As noted above, Article 6 envisages a situation in which powers are gradually transferred to the local population. In such a case, despite the fact that the Occupying Power could presumably recapture these powers by force, the Convention states clearly that it is only bound by those powers it continues to exercise:

> In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however the Occupying Power shall be bound for the duration of the occupation, ***to the extent that such Power exercises the functions of government in such territory***, by the provisions of the following articles of the Present Convention....(*emphasis added*)

The Convention, as a rule, ceases to apply one year after the end of military operations. Certain provisions, listed in Article 6, continue to bind the Occupying Power but only "to the extent that such power exercises the functions of government in such territory".

Indeed this has been the approach adopted both in law and in practice by the International Committee of the Red Cross. Following Israel's withdrawal from the Gaza Strip and Jericho Area in 1994, but prior to its subsequent redeployments in the West Bank, the ICRC's legal advisor, Dr. Hans-Peter Gasser, speaking to the International Colloquium on Human Rights in Gaza, addressed the complex question of the application of international humanitarian law to the territories following Israel's withdrawal. His conclusions with regard to the Gaza Strip and the Jericho Area at that time, are appropriate to the other areas from which Israel subsequently redeployed.

After noting that Gaza and Jericho were no longer "actually placed under the authority of the hostile army" and so not occupied territory as defined in the 1907 Hague Regulations, he went on to conclude that these areas were no longer subject to international humanitarian law:

> The ICRC has no reason to be there [in the Gaza Strip and Jericho Area] or to monitor compliance with international rules ***which do not apply.***" (*emphasis added*)

In practice too, the policy of the ICRC has been to treat areas from which Israel has redeployed not as occupied territory, but as what they indeed are: areas under Palestinian territorial jurisdiction and effective control.

Finally, in this regard, it should be noted that the Special Rapporteur compounds his error, by asserting that the Oslo Accords "leave Israel with the ultimate legal control over the entire OPT and ... for political reasons it has generally chosen not to exercise this control over the AA zones [sic]". While the Israeli-Palestinian agreements do contain a number of provisions which permit Israel to take security measures in areas under Palestinian jurisdiction, these are limited to very

specific cases, and could not by any standard be considered tantamount to "ultimate control". The selective and inaccurate reading of the Israeli-Palestinian agreements is particularly regrettable since they are crucial to understanding the current situation.

Factual findings and conclusions

The factual findings of the Special Rapporteur are difficult to respond to, consisting as they do of largely unsubstantiated generalizations and political assertions. Additionally most of the allegations raised have been addressed by Israel in other contexts, including in the submissions by Israel to the Mitchell Committee (available at www.mofa.gov.il). Accordingly Israel will restrict itself to making a number of general observations on the Special Rapporteur's comments.

Bias in presentation of the facts

The first point to be noted in the presentation of the Special Rapporteur's findings is the persistent political bias evident in the way he chooses to present the facts. On almost every occasion that he refers to casualties, Palestinian casualties are referred to prior to Israeli casualties, while wherever a reference is made to military actions the Israeli actions are listed first. The implication, that Israel initiated actions which led Palestinian injuries, is precisely the converse of the actual situation. In almost every single one of the thousands of clashes over the past year, Israel has responded to violence instigated by the Palestinian side.

The Special Rapporteur's bias does not cease with the presentation of the facts, but extends to the motivations imputed by him to Israel. Checkpoints established by Israel in order to try to protect civilians from terrorists and car bombs, are not, the Special Rapporteur assures us, "to prevent would-be suicide bombers from crossing checkpoints" but rather " to humiliate Palestinians and put pressure on them".

Nonetheless, the Special Rapporteur is to be commended for making any reference at all to Palestinian violations. Despite his legal assertion that his mandate only permits him to consider Israeli actions, he mentions numerous Palestinian violations, including the adoption of armed force, terrorist bomb attacks, and gunfire directed at Israelis. Additionally, while he reserves the bulk of his criticism for those measures adopted by Israel in response to the violence, he notes that the threshold for an non-international armed conflict has probably been met, and that Israel "may therefore by entitled to greater latitude in the exercise of its powers".

Bias in presentation of legal conclusions

The selective nature of those principles of international law cited by the Special Rapporteur is also striking. Criticizing what he terms Israel's policy of "selected assassination", he cites provisions of humanitarian law which prohibit violence against protected persons. He fails to mention, however, those provisions which make it clear that protected persons forfeit any protection under the Conventions when they cease to be civilians and engage in the conflict. The

point has been clearly stated by the ICRC in its manual on the law of armed conflict, which states:

> Civilians are not permitted to take a direct part in hostilities and are immune from attack. If they take a direct part in hostilities they forfeit this immunity. (*ICRC Model Manual on the Law of Armed Conflict for Armed Forces*, p. 29)

This lopsided presentation of international law is a persistent theme of the report. While almost every Israel measure is categorically stated to be a violation of existing principles of international law, the Special Rapporteur finds that "the planting of bombs in public places in Israel, resulting in loss of life of innocent civilians" is merely "contrary to emerging norms [!] of international law". The conception of an international regime in which measures taken to protect civilians from terrorism are violations, while the acts of terrorism themselves are at most contrary to "emerging norms", can only be described as staggering.

Bias in presentation of recommendations

The political agenda of the Special Rapporteur is most clearly evident in his recommendations. These, as might be expected, all require unilateral Israeli concessions. As far as the Palestinians are concerned the Special Rapporteur has no expectations from them. While they "could undoubtedly help to restore confidence by taking firmer measures to prevent terrorism in Israel" [note that terrorist acts against Israelis in the territories are not included], there is no expectation that they should engage in serious negotiations "until Israel takes some action which indicates a willingness to contemplate the termination of the occupation". As noted, the Special Rapporteur chooses to make no reference to the clearest statement of Israel's willingness to terminate the current situation – the peace proposals which were rejected by the Palestinian side.

The most insistent recommendation made by the Special Rapporteur relates to Israeli settlements. The Special Reporter cites the Mitchell Report as evidence that "peace is impossible without a complete freeze on settlements". He conveniently disregards the Mitchell Framework which only contemplates such a freeze after an effective cease-fire and cooling off period. He also determines that an immediate freeze is not sufficient: "It is not enough to merely impose a freeze on settlements. Steps must start to dismantle settlements". This is also in clear disregard for the terms of the peace process, under which settlements are to be addressed in the framework or permanent statues negotiations. For the Special Rapporteur the negotiations will not start until Israel has unilaterally conceded the issues to be negotiated.

Other recommendations include a call on the High Contracting Parties to the IVth Geneva Convention to convene to censure Israel. As noted above the application of the Convention to the territories in the current situation is highly questionable, but leaving this aside, the convening of the High contracting Parties to censure the one state that has ever implemented the provisions of this convention in practice – despite the many cases of occupation in the Convention's 50 year history – is hard to square with the humanitarian principles of neutrality and impartiality.

Finally, the Special Rapporteur calls for the introduction of "monitors or peace -keepers to ensure the cease-fire holds". The fact that there is no cease–fire to monitor, or peace to keep does

not trouble the Special Rapporteur. In practice, the only step required to achieve an end to the current violence, is for the Palestinian leadership to comply with its responsibility to act against the terrorism emanating from areas under its control. Until that happens no international presence will have any effect. The Mitchell Report, recognizing the political nature of the Palestinian call for internationalization of the conflict, and refrained from recommending the introduction of an international presence. It went on to caution that such a presence could only be effective "with the consent of all of the parties involved". The Special Rapporteur, however, rephrases this as an invitation to the international community to pressure Israel "to ensure that such an agreement is forthcoming".

In short, in all of his recommendations the Special Rapporteur ignores existing agreements between the parties as to the framework and process for resolving the issues between them, and insists instead that Israel make unilateral concessions, irrespective of the terror and violence promoted by the Palestinian side, before negotiations can even get under way.

Conclusion

Israel has repeatedly stated - and been supported by numerous previous Special Rapporteur's in this respect - that there can be no value in a report pursuant to a one-sided and anachronistic mandate. The current report is the strongest possible proof of this assertion.

But the current report is worse than of no value. It is a major step backwards. At a time when the world is struggling to combat the scourge of terrorism, the Special Rapporteur remains firm in his conviction that terrorism is only the "immediate cause" of the loss of innocent life; the "ultimate explanation" is occupation. Israeli parents who have their children blown up or shot in pizza bars, shopping malls or discotheques have the comfort of knowing that the ultimate responsibility for the death of their children is not with the Palestinian terrorist who targeted them (and who, after all, only contravened an "emerging norm of international law"). True responsibility lies, the Special Rapporteur assures us, with Israel's insistence on holding on to territory from which it has been repeatedly attacked, until its peace overtures finally meet with a response.

Whether the Report will achieve the political objectives that motivated remains to be seen. What is clear from the outset though, is that it will make no contribution whatsoever to ending the violence in the region, increasing the prospects of a negotiated settlement or enhancing the credibility of the instruments of humanitarian law.

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